Filed 7/29/19 In re D.S. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re D.S., a Person Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. M.S., Defendant and Appellant.	E071601 (Super.Ct.No. J276621) OPINION

APPEAL from the Superior Court of San Bernardino County. Erin K. Alexander, Judge. Affirmed.

William D. Caldwell, under appointment by the Court of Appeal, for Defendant and Appellant.

Michelle D. Blakemore, County Counsel, and Jamila Bayati, Deputy County Counsel, for Plaintiff and Respondent.

I.

INTRODUCTION

In June 2018, plaintiff and respondent, the San Bernardino County Department of Children and Family Services (Department), filed a petition on behalf of D.S. pursuant to Welfare and Institutions Code section 300[1] as a result of alleged physical abuse. At the time, D.S. was not residing with either of his parents. Instead, D.S. lived with his maternal grandmother, S.W., who had been appointed his legal guardian by order of the probate court. In addition to the allegations of physical abuse, D.S.'s petition also contained jurisdictional allegations against parents for failure to protect under section 300, subdivision (b). D.S.'s presumed father, defendant and appellant, M.S., appeals from the findings and orders made by the juvenile court during a November 2, 2018, joint jurisdiction and disposition hearing on D.S.'s petition.

Father contends that (1) there was insufficient evidence to support a jurisdictional finding against him under section 300, subdivision (b), (2) the juvenile court erred in ordering removal of D.S. from father apparently pursuant to section 361, (3) there was insufficient evidence to support denying placement of D.S. with father pursuant to section 361.2, subdivision (a), (4) the juvenile court abused its discretion in failing to consider paternal relatives for placement of D.S. pursuant to section 361.3, and (5) the juvenile

[1] Unless otherwise noted, all statutory references are to the Welfare and Institutions Code.

court erred in finding sufficient inquiry and notice under the Indian Child Welfare Act of 1978 (25 U.S.C.A. § 1901 et. seq.) (ICWA).

II.

FACTS AND PROCEDURAL BACKGROUND

D.S. is the son of father and K.W. (mother). Since 2016, D.S. has resided with S.W. and Sa.W. (maternal grandparents) as the result of father's incarceration. In 2018, S.W. was appointed legal guardian of D.S. by the probate court.

On June 15, 2018, a social worker responded to a referral from D.S.'s school alleging D.S. had been physically abused by maternal grandparents. After being interviewed by the social worker and law enforcement, D.S. was detained pursuant to a warrant.

On June 19, 2018, the Department filed a petition on behalf of D.S. naming S.W., mother and father. As to mother and father, the petition alleged that they failed to protect D.S. pursuant to section 300, subdivision (b) because they had a history of domestic violence.

On June 20, 2018, the Department filed a detention report.[2] As relevant to father, the report noted that D.S. visited father every other weekend and that D.S. denied witnessing any current domestic violence in father's home. However, D.S. did report witnessing one incident where father and maternal grandfather were involved in a

[2] While the record is unclear, it appears at some point in time the detention report was amended prior to the hearing on jurisdiction and disposition.

physical fight apparently over custody issues following a court hearing. The report also noted that father admitted to being previously convicted and incarcerated for a prior incident of domestic abuse.

On July 10, 2018, the Department issued a jurisdictional and dispositional report. As against father, the report alleged a history of domestic violence placing D.S. at significant risk of abuse and/or neglect as well as a violent criminal history placing D.S. at risk of harm and/or abuse. The report noted that father had been convicted of drug-related offenses involving a minor in 2009; had been convicted of driving under the influence of alcohol or a controlled substance (DUI) offense in May of 2014; and had been convicted of a domestic violence offense in September 2014. The report also noted that father had been arrested on three separate occasions for domestic violence related allegations in 2017.

The report concluded that D.S. should not remain in father's care because father was reluctant to participate in parent education or a domestic violence program and because father had not consistently parented D.S. due to father's prior incarcerations. The report further concluded that there were no noncustodial parents to consider, since it was recommending "removal" of D.S. from the home of S.W. and both parents.

Based upon the above, the report recommended that father be found the presumed father of D.S.; that D.S. might come under the provisions of ICWA; that D.S. be removed from the physical custody of mother, father and S.W. based upon clear and convincing evidence of detriment; and that placement with a noncustodial parent would be

detrimental to the safety, protection or well-being of D.S. The report also recommended a finding that placement with identified paternal relatives was not in D.S.'s best interest.

On August 30, 2018, the Department filed an additional information to the court, or "CFS 6.7" (CFS 6.7). The CFS 6.7 indicated that D.S. had been removed from more than one foster home due to behavior issues and been referred for mental health treatment. The CFS 6.7 also noted that D.S. had refused visitations with father and indicated that he would not feel safe being placed with father because D.S. believed father had "'anger issues.'" The CFS 6.7 did not materially change any of the recommended findings or orders as to father.

On November 1, 2018, the Department filed another CFS 6.7. With respect to father, the November 2018 CFS 6.7 noted that father had actively participated in the most recent child and family team meeting; father now agreed to participate in domestic violence classes; and that D.S. now wished to engage in visitations with father. The CFS 6.7 did not change any prior recommendations.

On November 2, 2018, the juvenile court held a combined jurisdictional and disposition hearing regarding D.S. The court accepted the Department's detention report, jurisdictional/dispositional report, August 2018 CFS 6.7 and November 2018 CFS 6.7 into evidence. The juvenile court found true jurisdictional allegations of abuse against S.W. As to father, the juvenile court did not find evidence of past criminal history but sustained the jurisdictional finding of failure to protect pursuant to section 300, subdivision (b) based upon evidence of past domestic violence. The juvenile court then

ordered D.S. "removed" from S.W., mother and father. In doing so, the juvenile court stated it was adopting the recommended findings and orders in the Department's August 2018 CFS 6.7. In its minute order, the juvenile court states: "[T]he court finds continuance in the home of the parents/legal guardian would be contrary to the child's welfare. Clear and convincing evidence shows that the child should be removed from the physical custody of the parents/legal guardian in that: there is substantial danger to the physical health, safety, protection, or physical or emotional well-being of the child or would be if the child were returned home, and there are no reasonable means by which the child's physical health can be protected without removing the child from the parent's physical custody." (Capitalization omitted.)

Additionally, the juvenile court made a finding of detriment, stating: "court finds placement with noncustodial parent detrimental to the safety, protection or physical/emotional well-being of child." (Capitalization omitted.)

The juvenile court declined to make a finding that placement of D.S. with identified paternal relatives was not in D.S.'s best interest. Instead, the court ordered placement of D.S. with a relative upon completion of a successful home assessment and RFA[3] approval.

Finally, the juvenile court found that the ICWA may apply, but that proper noticing under ICWA had been initiated.

[3] Resource family approval section 16519.5.

Father now appeals, stating that: (1) there was insufficient evidence to support a jurisdictional finding against him under section 300, subdivision (b); (2) the juvenile court erred in ordering removal of D.S. from father apparently pursuant to section 361; (3) there was insufficient evidence to support denying placement of D.S. with father pursuant to section 361.2, subdivision (a); (4) the juvenile court abused its discretion in failing to consider paternal relatives for placement of D.S. pursuant to section 361.3; and (5) the juvenile court erred in finding sufficient inquiry and notice under ICWA.

III.

DISCUSSION

A. *Substantial Evidence Supports the Court's Jurisdictional Finding Against Father*

Father contends that the juvenile court's jurisdictional finding against him is not supported by substantial evidence. We disagree.

1. *Addressing the Merits of Father's Jurisdictional Claim Is Appropriate*

As an initial matter, we address Department's argument that we should decline to consider the jurisdictional challenge because only one statutory basis was necessary for the juvenile court to assert jurisdiction and father failed to challenge the jurisdictional findings against mother or S.W.

"Because the juvenile court assumes jurisdiction of the child, not the parents, jurisdiction may exist based on the conduct of one parent only. In those situations an appellate court need not consider jurisdictional findings based on the other parent's

conduct." (*In re J.C.* (2014) 233 Cal.App.4th 1, 3.) Nevertheless, the court may exercise its discretion to reach the merits of the other parent's jurisdictional challenge where "(1) the jurisdictional findings serves as the basis for dispositional orders that are also challenged on appeal; (2) the finding[s] could be prejudicial to the appellant or could impact the current or any future dependency proceedings; and (3) the finding could have consequences for the appellant beyond jurisdiction." (*Id.* at p. 4.)

Here, the jurisdictional findings against father are also a basis for the dispositional orders challenged on appeal.[4] We thus exercise our discretion to consider the merits of father's challenge to the jurisdictional finding pertaining to him but conclude that substantial evidence supports that finding.

2. *Substantial Evidence Supports the Jurisdictional Finding Against Father*

With respect to father, the juvenile court made a jurisdictional finding pursuant to section 300, subdivision (b)(1), citing to father's record of past domestic violence. Father does not dispute the evidence before the court, but contends such evidence is insufficient to support such a finding. We disagree.

The juvenile court's jurisdictional findings are determined by a preponderance of the evidence. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 248.) The appellate court reviews the findings for substantial evidence. (*In re Yolanda L.* (2017) 7

[4] In fact, the Department argues that we should consider the sustained jurisdictional findings against father as prima facie evidence in support of the juvenile court's subsequent dispositional orders in urging us to affirm those orders.

Cal.App.5th 987, 992.) Under this standard, "we view the record in the light most favorable to the juvenile court's determinations, drawing all reasonable inferences from the evidence to support the juvenile court's findings and orders." (*Ibid.*) "'The judgment will be upheld if it is supported by substantial evidence, even though substantial evidence to the contrary also exists and the trial court might have reached a different result had it believed [the] other evidence." (*In re Travis C.* (2017) 13 Cal.App.5th 1219, 1225; citing *In re Dakota H.* (2015) 132 Cal.App.4th 212, 228.)

Here, father did not dispute that he engaged in a physically violent altercation with D.S.'s maternal grandfather in the presence of D.S.[5] Father's argument that this evidence is insufficient to show that D.S. was exposed to harm is unpersuasive. "Exposure to domestic violence may serve as the basis of a jurisdictional finding under section 300, subdivision (b)." (*In re R.C.* (2012) 210 Cal.App.4th 930, 941.) "'[D]omestic violence in the same household where children are living . . . is a failure to protect [the children] from the substantial risk of encountering the violence and suffering serious physical harm or illness from it.' [Citation.]" (*In re E.B.* (2010) 184 Cal.App.4th 568, 576.)[6] Thus, the

---

[5] According to the social worker, D.S.'s own description of the incident was that father "'beat my Grandpa up.'"

[6] Nor does father's characterization of D.S.'s maternal grandfather as the "aggressor" change this conclusion. A parent need not necessarily be blameworthy or at fault for creating the risk of harm under a failure to protect finding pursuant to section 300, subdivision (b)(1). (*In re R.T.* (2017) 3 Cal.5th 622, 633 [upholding section 300, subd. (b)(1) finding even where mother's actions did not directly create risk of harm]; see also *In re E.B., supra*, 184 Cal.App.4th at 576 [upholding section 300, subd. (b)(1) finding where mother returned to relationship where she was abused].)

juvenile court could reasonably infer that father's actions exposed D.S. to a risk of harm based upon this evidence. Moreover, father did not dispute that he had been convicted of a domestic violence offense involving a different individual on a separate occasion. As such, the juvenile court could also reasonably infer that father's domestic violence incident with D.S.'s maternal grandfather was not an isolated event and that D.S. faced an ongoing risk of exposure to domestic violence from father. We therefore conclude that substantial evidence supports the juvenile court's jurisdictional finding as to father.

B. *The Juvenile Court Erred in Ordering "Removal" from Noncustodial Parents*

Father also claims it was erroneous for the juvenile court to order "removal" of D.S. from father's physical custody in its disposition order. We agree, but conclude that any such error was harmless.

1. *The Statutes Do Not Authorize "Removal" From Noncustodial Parents*

The dependency statutory framework distinguishes between a parent with whom the child was residing at the time a section 300 petition was initiated (custodial parent) and a parent with whom the child was not residing at the time (noncustodial parent). (*In re Abram L.* (2013) 219 Cal.App.4th 452, 460-461.) Section 361 governs removal of a child from a custodial parent whereas section 361.2 governs placement of a child with a noncustodial parent. (*In re Luke M.* (2003) 107 Cal.App.4th 1412, 1422; *In re Nickolas T.* (2013) 217 Cal.App.4th 1492, 1500; *In re D'Anthony D.* (2014) 230 Cal.App.4th 292, 303.) An order purporting to remove a child from the custody of a noncustodial parent is not authorized under the statutory scheme. (*In re Julien H.* (2016) 3 Cal.App.5th 1084,

1089 [court could not order child removed from father's custody if child was not residing with father at time petition filed]; *In re Abram L., supra,* at p. 460 [same]; *In re Dakota J.* (2015) 242 Cal.App.4th 619, 627-630 [error to order removal from parent who did not reside with child]; *In re Anthony Q.* (2016) 5 Cal.App.5th 336, 352 [same].)

Here, the August 2018 CFS 6.7 filed by the Department recommended "removal" of D.S. from father, mother and S.W. The juvenile court adopted these recommendations, finding that there were no reasonable means to protect D.S. absent "removing the child from the parent's physical custody." (Capitalization omitted.) While the juvenile court did not explicitly reference any statute, it repeatedly used the word "remove" to characterize its own order and, more importantly, appears to have cited the substantive language of section 361, subdivision (c)(1) in its written order. Since it is undisputed that father did not reside with D.S. at the time the section 300 petition in this case was filed, the order purporting to "remove" D.S. from father's physical custody was erroneous. Father's request for placement should have been analyzed pursuant to section 361.2, subdivision (a).

2. *Any Error in Failing to Apply Section 361.2 Was Harmless*

Despite the juvenile court's apparent error in ordering "removal" of D.S. from father, reversal is not warranted unless the error was prejudicial. (*In re D'Anthony D., supra,* 230 Cal.App.4th at pp. 303-304 [error in failing to apply section 361.2 does not warrant reversal absent prejudice]; *In re Nickolas T., supra,* 217 Cal.App.4th at pp. 1507-1508 [same].)

As already noted, a noncustodial parent's request for placement after a child has been removed from a custodial parent or guardian is governed by section 361.2. (*In re Marquis D.* (1995) 38 Cal.App.4th 1813, 1820-1821.) Section 361.2, subdivision (a) provides that a child shall be placed with a noncustodial parent unless the juvenile court finds that doing so would be "detrimental to the safety, protection, or physical or emotional well-being of the child." (§ 361.2, subd. (a).) Here, the juvenile court expressly made such a detriment finding, stating: "[C]ourt finds placement with noncustodial parent detrimental to the safety, protection or physical/emotional well-being of the child." (Capitalization omitted.) While the juvenile court does not specifically reference section 361.2 in this order, both father and Department take the position it should be construed as an order pursuant to section 361.2.

Thus, any error by the juvenile court in mischaracterizing its order as an order of "removal" was harmless where the juvenile court made the requisite finding that would have supported denial of placement with father even if it had referenced the correct statute.

3. *Substantial Evidence Supports the Juvenile Court's Detriment Finding*

Father also contends that the juvenile court's detriment finding is not supported by substantial evidence. The record does not support this contention.

The juvenile court's order denying a noncustodial parent's request for placement under section 361.2 requires a finding of detriment by clear and convincing evidence.[7] (*In re Luke M.*, *supra*, 107 Cal.App.4th at p. 1426.) Its finding of detriment is reviewed for substantial evidence. (*Ibid.*)

Here, father acknowledged that he participated in a physically violent exchange with D.S.'s maternal grandfather in the presence of D.S. D.S.'s own description of the incident was that father "'beat my Grandpa up.'" Father had a prior conviction and incarceration for domestic violence against a cohabitant and a prior conviction for drug offenses involving a minor. Father admitted that he had ignored prior family law court orders that he take parenting classes and had expressed reticence to participate in a domestic violence program even after D.S. had been detained by the Department for months. Such evidence, even when viewed in light of the clear and convincing standard of proof, constitutes substantial evidence in support of the juvenile court's finding that placement of D.S. with father would be detrimental to D.S.'s well-being.

[7] We also note that the juvenile court was required to make findings, either in writing or orally on the record, as to the basis for its determination. (§ 361.2, subd. (c).) Here, although the juvenile court made clear it was finding detriment, it failed to explain the basis of this finding. Nevertheless, father has not challenged the absence of such formal findings on appeal and the lack of adherence to this statutory procedure does not warrant reversal where there is no evidence to suggest that the juvenile court would have answered the question differently had it complied with the statutory requirement. (See *In re J.S.* (2011) 196 Cal.App.4th 1069, 1078-1079.)

C. *The Order Conditioning Placement of D.S. with a Paternal Relative Upon RFA Approval Was Not an Abuse of Discretion*

Father also claims that the juvenile court abused its discretion in failing to order D.S. placed with paternal relatives at the time of the dispositional hearing in violation of the relative placement preference codified in section 361.3. We find no abuse of discretion.

"Section 361.3 gives 'preferential consideration' to a relative request for placement, which means 'that the relative seeking placement shall be the first placement to be considered and investigated.' [Citation.] The assessment of the relative shall involve the consideration of eight factors set out in the statute . . . ." (*Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023, 1033.) "However, preferential consideration under section 361.3 'does not create an evidentiary presumption in favor of a relative, but merely places the relative at the head of the line when the court is determining which placement is in the child's best interest.' [Citation.]" (*Alicia B. v. Superior Court* (2004) 116 Cal.App.4th 856, 863.)

A juvenile court's orders with respect to relative placement pursuant to section 361.3 is reviewed for abuse of discretion. (*In re Robert L.* (1993) 21 Cal.App.4th 1057, 1067; *Alicia B. v. Superior Court*, *supra*, 116 Cal.App.4th at p. 863.) "[T]he court is given wide discretion and its determination will not be disturbed absent a manifest showing of abuse. [Citations.]" (*Ibid.*)

Here, the Department assessed the identified paternal relatives on an emergency basis and discovered factors that weighed against placement. However, the juvenile court acknowledged that some of those paternal relatives were still providing information for the RFA process and stated that it would not deem such relatives unsuitable for placement until the RFA process was completed. The juvenile court declined to find that placement with paternal relatives was contrary to the best interests of D.S. and instead ordered the Department to complete the pending RFAs and place D.S. with a paternal relative upon RFA approval. We fail to see how such an order conflicts in any way with the requirements of section 361.3 and we find no abuse of discretion.

D. *The Juvenile Court's Determination That ICWA Notices Were Compliant Was Not Erroneous*

Finally, father argues that the juvenile court erred in finding that the notice requirements of the ICWA were met because he expressed a belief that he may have Native American ancestry and the Department failed to ask all known paternal relatives to investigate this potential ancestry. This contention is not supported by the record.

The notice requirements of the ICWA have been codified in California law.[8] (*In re Isaiah W.* (2016) 1 Cal.5th 1, 5.) Among other things, the statutory scheme requires proper notice to an Indian tribe before a court may place an Indian child in a foster home or terminate parental rights. (*Guardianship of D.W.* (2013) 221 Cal.App.4th 242, 249-

[8] Section 224.2.

250.) The notice requirements are triggered when a court knows or has reason to know that an Indian child is involved, even if the status of the child is not certain. (*Ibid*.)

Section 224.2, subdivision (e) also places an independent duty upon the court or social worker to make inquiries regarding possible Indian status of a child, including interviewing extended family members to gather information. (§ 224.2, subd. (e)(1).) However, such duty to investigate is not triggered unless the court or social worker "has reason to believe that an Indian child is involved in a proceeding." (§§ 224.2, subd. (e), 224.3, subd. (a).)

When initially asked by the juvenile court whether he had Native American ancestry, father orally responded "I believe so." As such, the juvenile court ordered father to complete the necessary forms to provide further information. However, when completing those forms, father did not identify any tribe and did not identify any family members with knowledge of potential Native American ancestry. Instead, father wrote only "'unknown.'"[9] This is not sufficient to trigger any further duty of inquiry with respect to paternal relatives.

A vague representation of belief in Native American ancestry, without more, does not give the juvenile court any reason to believe that a Native American child is in fact involved in the proceedings and does not trigger the notice and inquiry duties in section

[9] In fact, the Department's ICWA inquiry form specifically asked whether father "may" have Native American ancestry and offered father the option of responding "Yes", "No" or "Unknown." Instead of indicating that he may have Native American ancestry, father checked the box for "Unknown" and provided no further information.

224.2. (See *In re J.D.* (2010) 189 Cal.App.4th 118, 124-125 [statement that a child "might" have Native American is insufficient]; see also *In re O.K.* (2003) 106 Cal.App.4th 152, 155 [statement that child might have Indian ancestry without ability to identify tribe or family member with information is insufficient]; *In re J.L.* (2017) 10 Cal.App.5th 913, 923 [family lore of possible Indian heritage does not trigger social worker's duty to conduct further inquiry where mother "did not know whether she had American Indian heritage of any kind, did not know the names of the relatives who might have had such heritage, and had heard only a 'general or vague' reference to possible heritage"].) Thus, father's statement of belief that he has Native American ancestry, followed by his representation that all other information is "unknown" does not trigger any further duty of inquiry. Such information alone does not give the juvenile court "reason to believe" or "reason to know" that an Indian child is involved in the proceeding as required to trigger any duty of further inquiry under section 224.2 or section 224.3.

Additionally, the fact that the juvenile court adopted findings pursuant to ICWA does not support father's claim that such findings imposed a duty to further inquire of paternal relatives. The record indicates that following the initial detention hearing, both mother and S.W. notified the Department that they were claiming Indian heritage with the "Blackfoot" tribe. ICWA notices were sent out pursuant to this representation and acknowledged by both the Blackfeet Tribe of Montana and the Bureau of Indian Affairs. There is nothing in the record to indicate that the juvenile court's findings pursuant to ICWA were in any way related to the father's speculative representation of "unknown"

Indian ancestry such that any further duty to inquire of paternal relatives would have been triggered. We find no error in the juvenile court's orders in this regard.

IV.

DISPOSITION

The orders are affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

FIELDS
J.

We concur:

RAMIREZ
P. J.

McKINSTER
J.